IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 113 of 1999

in

SPECIAL CIVIL APPLICATIONNo 1979 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

JASHVANTSINH J GOHEL

Appearance:

1. LETTERS PATENT APPEAL No. 113 of 1999

MR VM PANCHOLI, AGP, for Appellants

MR PRABHAKAR UPADYAY for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE A.L.DAVE

Date of decision: 02/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This Letters Patent Appeal arises out of a judgment and order passed in Special Civil Application No.1979 of 1986, dated September 17, 1998, in favour of the respondent herein, who was the original petitioner.

2. The brief facts of the case are that, the respondent was sought to be compulsorily retired by virtue of an order dated 31st March, 1986 (Annexure-D to the petition), in exercise of powers under Rule 161(1) of the Bombay Civil Services Rules, 1959 ("BCSR" for short). Three months' pay and allowances in lieu of a notice period of three months was also paid to the respondent herein. On being aggrieved by the said order, the respondent approached this Court and sought interim relief, which was granted for a limited period. Somehow, the interim relief was not extended and it lapsed. However, on final conclusion, by the impugned order, the learned Single Judge came to a conclusion that the order of compulsory retirement passed by the Government was not sustainable and that before passing the order, no conclusion was arrived at to show that the order was passed in public interest. It was also found that the exercise was undertaken belatedly when the respondent was about to complete 57 years of age. It was in violation of a circular of the Government dated 25th October, 1963, which requires that such action is to be undertaken before the employee attains the age of 55 years. The learned Single Judge also observed that the respondent's performance was found to be average. A representation against adverse remarks for the year 1984-85 made by the respondent was pending, which has not been considered by the Government while passing the order of compulsory retirement. It was also observed that one of the reasons for passing the order was that it was not possible to revert the respondent and, therefore, he was made to compulsorily retire and, ultimately, the learned Single Judge allowed the petition, setting aside the order dated the 31st March, 1986, retiring the respondent prematurely. It was directed that the respondent should be deemed to be in service from the date of the impugned order till the date of superannuation at the age of 58 years, i.e. upto 9.6.1987, with all consequential benefits, treating the respondent as in service for the relevant period. The appellant authorities were directed to pay all arrears of pay and allowances to the respondent within three months from the date of the

judgment and order.

3. Aggrieved by the said judgment and order, the present intra-court appeal is preferred by the State on the ground that the order dated 31st March, 1986, was passed in exercise of powers under Rule 161(1) of BCSR. The order was passed after the case of the respondent was considered by the Review Committee in light of the Confidential Reports of the respondent. The learned Single Judge has committed an error in not considering these aspects. It is also contended that pendency of representation against adverse remarks ought not to have been considered as a hindrance to the passing of the order by the appellant.

4. Learned Assistant Government Pleader for the appellant, while relying on the decision in Baikuntha Nath Das v. Chief District Medical Officer, Baripada, AIR 1992 SC 1020, submitted that, uncommunicated adverse remarks can be considered while passing such orders and, therefore, pendency of representation against adverse remarks is in no way a hindrance to passing of the order. The case of the respondent was considered by the Review Committee in its proper perspective and it was deemed proper to make him retire compulsorily by exercising powers under Rule 161 of the BCSR.

5. No one appears for the respondent.

6. We have been taken through the record. The learned Single Judge has taken a view that there is no finding of the Review Committee that the termination of services of the respondent is necessary in public interest. He also observed that the consideration was attaining age of 57 years by the respondent on 9.6.1986. The learned Judge observed that, if the services of the petitioner were not satisfactory, the petitioners case ought to have been considered much earlier and could have been reverted to the lower post. The learned Judge observed that the order impugned also does not speak of it having been passed in public interest. Lastly, it was found that, initially, ad-interim relief was granted in favour of the respondent-original petitioner for a limited period, which continued upto September 12, 1986. Since it was not extended thereafter, the respondent was made to retire from September 17, 1986. Ultimately, the conclusion was that the order impugned before the learned Single Judge was passed on extraneous consideration and that there is nothing to indicate that it was in public interest. The learned Judge also observed that, most of the adverse remarks have been expunged and that the order

is passed dehors the Government Resolution requiring this exercise to be undertaken before six months of the employee completing the age of 55 years. Therefore, the petition of the respondent was allowed and the order of premature retirement of the respondent passed by the appellants was quashed and set aside, and the respondent was ordered to be treated as deemed to be in service from the date of the impugned order till the date of his superannuation, i.e. 9.6.1987, with all consequential benefits.

7. We find that there is no dispute about the fact that the order is passed in exercise of powers under Rule 161(1)(aa)(i) of the BCSR. The Rule runs as under :-

"161.(1)(a) Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV servant, is the date on which he attains the age of 58 years.

Provided-

(i) Deleted.
(ii) Deleted.
(iii) He may be retained in service after the date of compulsory retirement only with the previous sanction of Government on public grounds which must be recorded in writing.

(aa) Notwithstanding anything contained in clause (a).-

(i) An appointing Authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice:

(1) if he is in Class I or Class II service or post or in any unclassified gazetted post, the age limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age

of 50 years, and

(2) if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years, on or after the date on which he attains the age of 55 years;

(ii)....."

8. There is no dispute about the fact that the order was passed after the case of the respondent was considered by the Review Committee and that the said consideration was just before the respondent attaining 57 years of age. In this regard, it would be appropriate to refer to G.R. of the Government bearing No.GAD No.CRA 1063/G dated 25th October, 1963 (Annexure-E). Paragraph 2, particularly clause (a) is relevant. It provides that such an action is required to be taken six months before the Government servant attains the age of 55 years. His record should be carefully examined by the authority competent to make the appointment to the post which he is holding and a decision should be taken whether he should be retired on attaining the age of 55 years. Clause (c) requires that it is necessary that this process should be completed in each case in about three months time, so that, in the event of retirement being finally decided upon, it is possible to serve a notice on the Government servant concerned at least three months before the date on which he attains the age of 55 years and his retirement thus is given effect to as soon as possible. In the instant case, the action taken is belated when the respondent was about to complete the age of 57 years Therefore, it is in violation of clauses (a) and (c) of paragraph 2 of the said G.R.

9. We further find that, undisputedly, the respondent was assessed as an average performer in his Annual Confidential Reports considered by the authority for the relevant period. There is clause (f) in the above referred G.R. which says that since under the amended rules, the normal age of retirement of a Government servant is raised to 58 years, it is the feeling of the Government that it is only when a Government servant falls below the average standard that he should be proposed for retirement before attaining the age of 58 years. It is provided therein that the test whether a Government servant should be allowed to

continue upto the age of 58 years should not, for obvious reasons, be as rigorous as the one which would be applied when considering whether the Government servant should be given extension of service beyond the age of superannuation. Thus, in absence of the respondent having been assessed as below average, the direction in clause (f) of the said G.R. ought to have been followed.

10. It is true that there were certain adverse remarks against the respondent, but, undisputedly, some of them have been expunged and it is under these circumstances that pendency of representation against adverse remarks for the year 1984-85 would assume greater weightage.

11. The learned Assistant Government Pleader was not in a position to dispute the above aspects nor was he able to demonstrate before us that the decision was taken in public interest since the order retiring the respondent does not speak of the action being taken in public interest. The relevant decision of the Review Committee does not form part of the record. Excepting a bald statement in the affidavit-in-reply, there is no supporting material indicative of the fact that the decision to retire the respondent was taken in public interest.

12. There is total absence of reasons for not taking action before the respondent attaining the age of 55 years. Likewise, there is total absence of material to indicate that something drastic had occurred between the date on which the respondent attaining the age of 55 years and the passing of the order, which would call for such a drastic action.

13. We are in agreement with the reasonings adopted by the learned Single Judge and the conclusions arrived at by him. It is true that uncommunicated adverse remarks can be considered while compulsorily retiring an employee, as held by the Apex Court in Baikuntha Nath Das's case (supra). But here, apart from pendency of representation against adverse remarks for the year 1984-85, there are other material lapses which called for interference at the hands of the learned Single Judge, namely, absence of material to show that the decision was taken in public interest, delayed action, absence of reasons for taking delayed action, and not following Government's own G.R. that only in cases where the employee is found to have been assessed as below average, recommendation may be made for compulsory retirement. In our opinion, therefore, in facts of the case, the learned

Single Judge came to a correct conclusion. No other contention is taken. In facts of the case, in our opinion, there are no reasons to disturb the finding of the learned Single Judge in exercise of intra-court appellate jurisdiction under the Letters Patent Clauses. The appeal must fail and is, therefore, dismissed. No costs.

[B.J. SHETHNA, J.]

[A.L. DAVE, J.]

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